

NOTE: THE CONFIDENTIALITY OF THE NAMES OR IDENTIFYING PARTICULARS OF ANY CLAIMANTS, REFUGEES OR PROTECTED PERSONS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA176/2014
[2014] NZCA 310**

BETWEEN HAKAORO HAKAORO
 Appellant

AND THE QUEEN
 Respondent

Hearing: 18 June 2014

Court: White, Keane and MacKenzie JJ

Counsel: M E Goodwin and S M Kilian for Appellant
 K Raftery and H Musgrave for Respondent

Judgment: 8 July 2014 at 9.30 am

JUDGMENT OF THE COURT

An extension of time for filing the appeal is granted, but the appeal is dismissed.

REASONS OF THE COURT

(Given by White J)

[1] The appellant, Mr Hakaoro, appeals against a sentence of one year and eight months' imprisonment imposed on him in the Manukau District Court by Judge Paul after he pleaded guilty to six charges of providing immigration advice without a licence and one charge of holding himself out as an immigration adviser without a

licence.¹

[2] Mr Hakaoro's appeal was filed out of time, but, as the Crown did not oppose his application for an extension of time for filing the appeal, it is granted.

[3] The summary of facts, which Mr Hakaoro accepted when he pleaded guilty to the charges,² disclosed that between November 2009 and March 2011 he held himself out as a person who provided advice on immigration matters despite not being licensed or exempt from being licensed as required by the Immigration Advisers Licensing Act 2007. The summary contained details of Mr Hakaoro's victims and the sums of money lost through his unlawful activities.

[4] The summary of facts did not record, however, that before the offending came to light on 15 August 2011, when the Immigration Advisers Authority (the Authority) located folders relating to victims at Mr Hakaoro's property, Mr Hakaoro had obtained an Immigration Advisers' Licence on 24 June 2011. Nor did the summary of facts record that his licence had been cancelled by the Immigration Advisers Complaints and Disciplinary Tribunal in a decision dated 15 August 2013 upholding complaints against Mr Hakaoro for failing wholly to provide the professional services he charged for, for being dishonest and misleading and failing to meet minimum professional standards.³

[5] The pre-sentence report before the Judge recommended imprisonment because, while Mr Hakaoro was considered to have a low risk of reoffending and no criminal history, he showed a lack of remorse in that he appeared to be more concerned about himself than his victims. The report also referred to the possibility of home detention, which would enable Mr Hakaoro to attend rehabilitative programmes. The report mentioned that Mr Hakaoro was willing to pay reparation of \$20 per week. The report also mentioned that he had been living with his partner "for over 20 years" and that he was her only means of support because she was not eligible for any benefit as she was not a New Zealand citizen. The report then stated:

¹ *Department of Labour v Hakaoro* DC Manukau CRI-2011-092-19106, 22 January 2014.

² At [21].

³ *BN & MN v Hakaoro* [2013] NZIACDT 64 (the penalty decision) and see also *BN & MN v Hakaoro* [2013] NZIACDT 51 (the substantive complaint). Five separate complaints proceedings against Mr Hakaoro were upheld in the same year.

Mr Hakaoro has a vast background in government positions ranging from a child protection officer and human services officer at the Department of Social Welfare in Queensland, Australia. He also worked in New Zealand as a senior social worker and as a trained broadcaster on radios in NZ and Australia. He has also served as a sub-editor of debates for the Cook Islands Parliament. Mr Hakaoro also reported that he worked cohesively with Immigration Advisors Authority on immigration matters relating to Pacific Island peoples.

[6] In sentencing Mr Hakaoro, Judge Paul took into account:

- (a) The seriousness of the charges as demonstrated by their maximum penalties (seven years' imprisonment or a \$100,000 fine and any additional amount imposed by the Court for the charges of providing immigration advice without being licensed and two years' imprisonment or a \$10,000 fine and any additional amount imposed by the Court for the charge of holding himself out as an immigration adviser without being licensed or exempt).⁴
- (b) The effect of the serious breach of trust offending on particularly vulnerable victims and the money they lost (\$13,300).⁵
- (c) The disgraceful nature of Mr Hakaoro's behaviour in ignoring his lawful obligations by benefitting financially from his victims, giving untrue advice and claiming to have filed applications that had not been filed.⁶
- (d) A restorative justice report relating to one victim that indicated that the victim had been "very generous indeed in forgiving [Mr Hakaoro] for the harm" and that the restorative justice co-ordinator assessed genuine remorse towards the victim, which was favourable for Mr Hakaoro.⁷
- (e) An earlier sentencing indication by Judge McAuslan that home detention would be considered in the event of a favourable

⁴ *Department of Labour v Hakaoro*, above n 1, at [1]–[2].

⁵ At [3]–[4].

⁶ At [5]–[6].

⁷ At [7].

pre-sentence report.⁸

- (f) Mr Hakaoro's previous convictions for driving with excess breath alcohol and assaults which were not before Judge McAuslan.⁹
- (g) The Crown submissions which opposed home detention on the grounds that Mr Hakaoro's home address where the offending had occurred was inappropriate and the pre-sentence report, which recorded his lack of remorse, was not favourable.¹⁰ The Crown also pointed out that when Mr Hakaoro had been examined separately he had disclosed that he was insolvent (and accordingly would not be able to meet a reparation order) and that the statement attributed to Mr Hakaoro in the pre-sentence report about working cohesively with the Authority on immigration matters relating to Pacific Island people was squarely disputed by the Authority and was a false representation.
- (h) The submissions for Mr Hakaoro which challenged the accuracy of the pre-sentence report in respect of the length of his relationship with his partner (five years not 20), his alleged lack of remorse (contending that he was in fact remorseful), the offer of reparation (contending it was genuine) and the statement about working cohesively with immigration advisers (he meant that he had worked as an immigration adviser).¹¹ Mr Hakaoro sought a sentence of home detention.¹²

[7] The Judge then said:

[23] It seems to me that pre-sentence report is a document I can rely on, and it really demonstrates to the Court an attempt by you to paint yourself in the best possible light but in doing that you have clearly, in my view, attempted to mislead the Court. This is not surprising giving you face dishonesty charges in effect, and you are continuing in this dishonest fashion given the report I have before me.

⁸ At [8] and [13].

⁹ At [10].

¹⁰ At [13]–[17].

¹¹ At [15], [18], [20]–[22].

¹² At [18] and [25].

[24] Your counsel says that the restorative justice report where you met with [a victim] is a far better reflection of your remorse on the offending than anything contained in the pre-sentence report. I do not accept that submission. It seems to me the restorative report is simply a generous response by one of your victims, certainly you could not say that for the remainder who have been seriously harmed by your actions.

[8] The Judge adopted a starting point of two years' imprisonment to reflect the particular aggravating features of Mr Hakaoro's offending, namely the harm to his victims and the commercial nature of the offending.¹³ A reduction of 15 per cent for the guilty plea then resulted in an end sentence of one year and eight months (rounding down).¹⁴ A reparation order of \$5,000 was also made.¹⁵

[9] On the question of home detention, the Judge said:

[28] I then considered whether a sentence of home detention is appropriate for you, Hakaoro Hakaoro. A sentence of home detention would only be available on a favourable report. On any assessment of that pre-sentence report it is unfavourable. In fact it is an attempt by you to mislead the Court, to paint yourself in a far more favourable light. On that basis alone it seems to me through your own actions you have determined that home detention is not appropriate. I am satisfied sending you to serve your sentence at your home address would send absolutely the wrong signal to the South Auckland community; that persons like you can mislead people, take advantage of them, and then return to that same community albeit under a restrictive sentence. Your behaviour demonstrated in this pre-sentence report confirms your dishonest characteristics and in my view they would not be advanced by a sentence of home detention.

[10] Mr Hakaoro's grounds of appeal are that the Judge erred in failing to:

- (a) give him discounts for his restorative justice efforts and the imposition of the \$5,000 reparation order; and
- (b) accept that the alleged mistakes in the pre-sentence report meant that it should not have been viewed as unfavourable and that a sentence of home detention was therefore appropriate.

[11] In support of the ground of appeal relating to the alleged mistakes in the pre-sentence report, Mr Hakaoro and his brother, Mr David Hakaoro, filed affidavits

¹³ At [26].

¹⁴ Ibid.

¹⁵ At [27] and [29].

about the information provided to the Probation Officer, Mr Michael Muldoon. Issue was taken with the statements in the report about Mr Hakaoro “working cohesively” with the Authority, his lack of remorse and the length of his relationship with his partner.

[12] Mr Hakaoro produced as an exhibit to his first affidavit a copy of a letter apparently dated 30 December 2013 addressed to the State Services Commissioner on the subject of “Application for Government Positions”. In the letter Mr Hakaoro stated that he wrote to “table my application for the issue of the above position licence”. After referring to his work experience in Australia and New Zealand, Mr Hakaoro said in the letter:

Having come from a former colony namely the Cook Islands, I understand the destruction to cultures, customs, and traditions and so forth inflicted on the people by legislation and policies of colonial masters. Similarly I also recognise the dependency of the natives on Government financial provisions such as the child benefits, old age pensions and other allowances including dependency on governmental employment. I understand too that like my own people, the indigenous people of the Pacific have also endured the same impact. For this reason, amongst others, working cohesively with other staff of the Immigration Advisers Authority (IAA) would appear to be fundamentally important and should be encouraged by the Registrar and other senior officers. In fact this entails ensuring that members of the staff of IAA are clear about their own roles and those of others. Role clarification is important to me, as I believe this is essential in maintaining a professional working relationship with IAA while at the same time providing effective client service to the public.

[13] Mr Hakaoro deposed that he had given a copy of this letter to Mr Muldoon to use for his pre-sentence report.

[14] Mr Muldoon filed an affidavit in response acknowledging his error over the length of Mr Hakaoro’s relationship and confirming that he had received and used the information in the letter to the State Services Commissioner in his report. Mr Muldoon also confirmed his belief in the accuracy of the statements in his report about Mr Hakaoro’s lack of remorse.

[15] All three witnesses were called for cross-examination on their affidavits. Mr Hakaoro told us that:

- (a) On the question of remorse he had referred Mr Muldoon to the restorative justice conference at which he would be apologising to all the victims.
- (b) The letter to the State Services Commissioner had been written at an earlier date in support of his application for “a licence to practise immigration” and that he had written the comments about working cohesively:

recognising the importance of working closely with [the] IAA, not only for me, but also for other advisers, as should I, or should others, get the licence or get appointed.

- (c) He had not spoken to Mr Muldoon about the 2013 decisions of the Immigration Advisers Disciplinary Tribunal upholding five complaints against him. He said he had not been asked about the decisions and did not think they were relevant.
- (d) He did not accept that the letter to the State Services Commissioner was misleading in relation to his work in the immigration field.
- (e) He had been honest when he told Mr Muldoon that he would pay \$20 per week to his victims even though he had told the Immigration Tribunal that he did not have “a cent”.

[16] Mr David Hakaoro told us that, when Mr Muldoon had asked Mr Hakaoro what he would say to his victims, he (Mr David Hakaoro) interrupted and said “no you don’t have to say anything”.

[17] For Mr Hakaoro, Mr Goodwin cross-examined Mr Muldoon at some length about his interpretation of Mr Hakaoro’s letter to the State Services Commissioner and the contents of his pre-sentence report relating to the letter, the question of remorse, the restorative justice conference and Mr Hakaoro’s financial position. We are satisfied, however, that, with the exception of the references to the length of Mr Hakaoro’s relationship with his partner, Mr Muldoon’s pre-sentence report accurately recorded Mr Hakaoro’s position as it had been conveyed to him.

[18] At the same time, however, we are also satisfied that the report was incomplete because Mr Muldoon was unaware of the facts relating to Mr Hakaoro's acquisition of an immigration advisers' licence in June 2011 and its cancellation by the Immigration Advisers Complaints and Disciplinary Tribunal in August 2013, or Mr Hakaoro's previous criminal history.

[19] Against this background, we are satisfied that Mr Hakaoro's appeal based on alleged mistakes in the pre-sentence report is misconceived.

[20] First, the alleged mistakes in the report were all drawn to the attention of Judge Paul. In light of Mr Hakaoro's previous criminal history and the further information provided by the Crown to the Judge about the views of the Authority and Mr Hakaoro's true financial position, the Judge correctly treated Mr Hakaoro's explanations with scepticism.

[21] Second, Mr Hakaoro gave the letter he had written to the State Services Commissioner to Mr Muldoon with the intention that it should be used to paint him in a favourable light. In doing so, Mr Hakaoro plainly intended to mislead Mr Muldoon because he deliberately failed to disclose to Mr Muldoon anything about his Immigration Advisers' licence and the Tribunal decision cancelling it.

[22] Third, in these circumstances Judge Paul's view that Mr Hakaoro had attempted to mislead the Court was entirely justified. Mr Hakaoro's attempt to mislead this Court reinforces this conclusion.

[23] Fourth, as the evidence of Mr Hakaoro and his brother in this Court confirmed, the pre-sentence report accurately recorded Mr Hakaoro's lack of remorse for his victims. Judge Paul cannot be criticised for giving the pre-sentence report greater weight on this issue than the restorative justice report.

[24] Finally, Judge Paul was entitled to give little weight to Mr Hakaoro's offer of reparation when the later information provided by the Crown showed that Mr Hakaoro was insolvent.

[25] Accordingly, we agree with Judge Paul that a sentence of imprisonment rather than home detention was appropriate. We also agree with Judge Paul that his starting point of two years and his discount of 15 per cent were correct. The end sentence of one year and eight months' imprisonment cannot be described as manifestly excessive.

[26] The appeal is therefore dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent